

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STEVEN D. JACKSON,

No. C-10-2521 JCS

Plaintiff,

**ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

v.

[Docket No. 23]

SIMON PROPERTY GROUP, INC.,

Defendants.

I. INTRODUCTION

On Friday, May 20, 2011 at 9:30 a.m., the Defendant Simon Property Group Inc.'s ("Defendant") Motion for Summary Judgment ("the Motion") came on for hearing.¹ Having considered the papers and arguments of counsel, and for the reasons stated below, the Motion is GRANTED.

II. BACKGROUND

A. Facts²

Plaintiff Steven D. Jackson ("Plaintiff") was employed at Stoneridge Mall as the Director of Operations beginning in February 2008. Joint Statement of Undisputed Facts ("JSUF") 2. Defendant Simon Property Group, Inc. ("Defendant") owns and operates shopping malls throughout the United States, including the Stoneridge Mall in Pleasanton, California. JSUF 1. Defendant

¹The parties have consented to the disposition of this case before a Magistrate Judge pursuant to 28 U.S.C. § 636(c).

² Unless otherwise indicated, the following facts are taken from the parties' Joint Statement of Undisputed Facts.

1 considers Stoneridge to be an upscale mall. JSUF 46 (Pl. Depo. I at 126:23-127:1, Vito Dec. ¶
2 10).

3 Colin Vito became the Mall Manager and Plaintiff's direct supervisor in November 2008.
4 JSUF 2 (Pl. Depo I at 128:10-15, 150:6-8, attached to the Stein Dec.; Vito Dec. ¶¶ 1, 5). Vito began
5 working for Simon in 2005 as an Assistant Mall Manager for a mall in Mission Viejo. JSUF 3. He
6 was then promoted to Mall Manager and managed malls in Albuquerque, New Mexico and Aurora,
7 Colorado before being becoming the Mall Manager at Stoneridge. *Id.* As Mall Manager, his job
8 duties were to oversee the general operations of the malls he managed from an operations,
9 marketing, and administrative perspective. JSUF 4 (Vito Dec. ¶ 2). This included being able to
10 assign tasks to the various departments, including the Operations Department, that he believed
11 needed to be, or should be, done by those departments. *Id.* At each of the malls that he managed,
12 Vito oversaw an Operations Department which was run by an Operations Director. JSUF 5 (Vito
13 Dec. ¶ 3). If there were more maintenance jobs to be done at a given time than the number of
14 maintenance workers on duty, Vito expected the Director of Operations to handle some of the
15 maintenance duties to ensure that the jobs got done timely. JSUF 6 (Vito Dec. ¶ 3). Vito was never
16 told that the Operations Directors were not to perform physical maintenance tasks. JSUF 7 (Vito
17 Dec. ¶ 3).

18 As Director of Operations, Plaintiff's main job duty was to oversee the maintenance
19 department and supervise the maintenance workers to ensure that the mall was maintained properly.
20 JSUF 8 (Pl. Depo. II at 226:25-227:7, Pl. Depo. I at 31:7-10, 126:17-22). Sixty to seventy percent
21 of Plaintiff's job entailed walking the interior and exterior of mall, which is approximately
22 1,300,000 square feet, to assess the condition of the property. JSUF 9 (Pl. Depo. at 92:8-93:8).
23 Plaintiff also was to review contracts and to help customers with maintenance issues and build outs.
24 JSUF 10 (Plaintiff Depo. II at 226:25-227:7, Pl. Depo. I at 33:12-22). He also did occasional
25 physical maintenance tasks, including pushing the mobile sales kiosks stationed in the mall,
26 checking phone and electric lines, putting up light stands, and picking up trash. *Id.* Plaintiff's
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1 normal working hours were 7:00 a.m. to 7:00 p.m. JSUF 11 (Pl. Depo. I at 52:21-53:1, 54:3-7). He
2 worked five to six days per week, meaning that he worked on average 50 to 70 hours per week. *Id.*

3 Plaintiff put in these hours because the Operations Director position demanded it and he
4 would often be called in to handle issues. JSUF 12 (Pl. Depo. I at 54:8-11). The Job Description
5 for Operations Director position states that Operations Directors may need to carry materials and
6 equipment up to and exceeding 50 pounds. JSUF 13 (Courtney Dec. ¶ 3 and Ex. 28 thereto).
7 Plaintiff recognized that Vito had the authority to assign operations and maintenance tasks to him
8 and the Operations Department. JSUF 14 (Pl. Depo. I at 44:16-21).³

9 On February 5, 2009, Vito asked Plaintiff to help a maintenance worker disassemble portable
10 sales kiosks in the mall that were not being used and load them into a storage container. JSUF 15
11 (*id.* at 45:4-13, and Ex. 1 thereto, attached to the Stein Dec. as Ex.1). It was not a typical task
12 performed by the Operations Department, but if it needed to be performed, Vito had the right to
13 assign it to the Operations Department. *Id.* (27:20-28:27). In doing so, Plaintiff suffered a back
14 injury. On February 9, 2009, Plaintiff informed Vito that he injured his back and requested time off,
15 which he was given. JSUF 16 (Pl. Depo I at 49:24-50:7).

16 On February 11, 2009, Plaintiff provided Vito with a doctor's note stating that he would be
17 out of work for two days with a 10 pound lifting restriction. JSUF 17 (Pl. Depo. I at 65:7-10,
18 71:25-72:6, Franket Dec. ¶ 4 and Ex. 5 thereto). Plaintiff states that he returned to work on February
19 11, 2009, with his doctor's note, but that Vito ordered him to go home. Pl. Dec. ¶19. Plaintiff
20 returned to work on February 19, 2009. JSUF 18. On that day, Plaintiff came to work with a
21 doctor's note (and gave it to Vito), which stated his work restrictions. *Id.* He could not work more
22 than 4 to 6 hours on a given day, and he would have to rest for 10 minutes every two hours, and
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24 ³Plaintiff states in his declaration that when he applied for the job, there was no mention of
25 lifting over 50 pounds, nor was that aspect of the job ever explained to him or described as an "essential
26 function" of his position as Operations Director. Pl. Decl. ¶¶ 5, 8, 10. He further states that during his
27 employment with Defendant, lifting was not a regular part of his job performance and that he only
28 "performed lifting. . . on rare occasions to assist a maintenance worker, my subordinate, when no other
maintenance worker was available." *Id.* ¶ 12

1 would have to ice his back for an additional 10 minutes every hour. He was limited to lifting no
2 more than 5 pounds, and in kneeling, climbing, pulling, pushing, stooping and crawling. *Id.* (Pl.
3 Depo. I at 52:6-19, 53:11-14, 54:19-55:8 and Ex. 4 thereto, attached to the Stein Dec. as Ex. 4).
4 Plaintiff was taking Vicodin to help with the pain in his back, as well as the muscle relaxant
5 Cyclobenzaprine. JSUF 19 (Pl. Depo. I at 66:20-67:5 and Ex. 6 thereto, attached to the Stein Dec. as
6 Ex. 6).

7 On February 19, 2009 Plaintiff went back on leave. JSUF 20. During his leave, Plaintiff had
8 filed a Workers' Compensation claim and was being compensated through that claim. *Id.* (Franket
9 Dec. ¶ 6). Plaintiff states in his declaration that he reported to work on February 19, 2009, but that
10 Vito sent him home, telling him that he would not accommodate Plaintiff's work restrictions by
11 providing him with light duty. Pl. Dec. ¶ 21. Plaintiff states that "at no time did Vito discuss the
12 essential functions of my Operations Director position with me prior to sending me home. Further,
13 no other manager of defendant discussed with me the essential functions of my position as
14 Operations Director or the provision of an accommodation of my work restrictions prior to Vito's
15 instructing me to go home." *Id.*

16 On February 21, 2009, Plaintiff went to the doctor. JSUF 21 (Pl Depo. I at 65:7-10,
17 71:25-72:6, Albright Dec. ¶ 4 and Ex. 5 thereto). He was placed on "complete bed rest" for two
18 days and told to take medication "around the clock." *Id.* The doctor also determined that Plaintiff
19 was not able to perform his usual work. *Id.* Plaintiff saw the doctor again on February 25, 2009; he
20 was given a "Work Release" form that stated that he was unable to return to work until March 12,
21 2009. JSUF 22 (Pl. Depo. I at 72:10-13 an Ex. 7 thereto, attached to the Stein Dec. as ¶ 7).

22 On March 2, 2009, Plaintiff states that he wrote Carol Franket an email requesting that
23 Defendant accommodate his work restrictions as set out in his work release of February 18, 2009.
24 Pl. Dec. ¶ 22. Plaintiff told Franket that he knew that Defendant through Vito was accommodating a
25 maintenance worker in his department who had a work-related injury by providing him with light
26 duty. Pl. Dec. ¶ 22, Franklin Dec., Ex. J. Franket responded by email that "as a company we do not
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1 have light duty for our salaried exempt employees. Workers Compensation will be paying you until
2 you are fully released and ready to return to the workplace.” *Id.* (Citing Franklin Dec., Exh. K).

3 Plaintiff went to the doctor again on March 26, 2009. JSUF 23. He was given a “Work
4 Release” form that stated that he was unable to return to work until April 13, 2009. *Id.* (Pl. Depo. I
5 at 77:8-12, Vito Dec. ¶ . 21 and Ex. 9 thereto).

6 On April 23, 2009, Plaintiff presented a Work Release, which stated that he could return to
7 work with a lifting restriction of 35 pounds for two weeks. JSUF 24 (Pl. Depo. I at 81:4-13 and
8 Ex. 10 thereto, which is attached to the Stein Dec. as Ex. 10). There was no restriction on the
9 number of hours that Plaintiff could work. Pl. Dec. ¶ 23. Vito again sent Plaintiff home stating “We
10 are awaiting a full 100% release from your treating physician. . .” *Id.* (Citing Franklin Dec., Ex. Z).

11 On May 7, 2009, Plaintiff provided a “Work Release” form stating that he was returned to
12 full work. JSUF 25. As a result, Plaintiff returned to work on or about May 9, 2009. *Id.* (Pl. Depo.
13 I at 83:2-18 and Ex. 11 thereto, which is attached to the Stein Dec. as Ex. 11, Complaint ¶ 20).
14 Plaintiff worked his regular shift performing his usual job duties. JSUF 26 (Pl. Depo. I at 90:7-23).
15 During this time, Plaintiff was still taking Vicodin and a muscle relaxant. JSUF 27 (Pl. Depo. I at
16 93:9-14). Plaintiff still had discomfort in his back. JSUF 28. On May 11, 2009, he sent an email to
17 Carrie Williams, Director of Marketing and Business Development for Stoneridge, stating that while
18 he was back at work, he did not know how long he could continue to work. *Id.* By writing this,
19 Plaintiff meant that he still had tightness in his back and thought he might have to go on leave again.
20 *Id.* (Pl. Depo. I at 94:8-17, 95:3-17 and Ex. 13 thereto, attached to the Stein Dec. as Ex. 13). His
21 back injury was also aggravated by walking the mall (Pl. Depo. I at 91:21-92:1). JSUF 29. Plaintiff
22 began experiencing a sharp pain in his back and could not get comfortable. JSUF 30 (Pl. Depo. I at
23 98:1-11).

24 On May 17, 2009, Plaintiff sent an email to, among others, Vito stating that he needed to go
25 to the doctor because of the pain in his back. JSUF 31. Plaintiff wrote that “[he has] been in pain
26 since Friday and it has only become worse over the weekend, even with the rest and doing nothing
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all weekend.” *Id.* (Pl. Depo. I at 106:23-107:24 and Ex. 19 thereto, attached to the Stein Dec. as Ex. 19). The next day, May 19, 2009, Plaintiff went to the doctor because of the pain his in back. JSUF 32. His doctor gave him a Work Release form stating that he was unable to return to work until May 22, 2009. *Id.* His doctor also put him on “absolute bed rest” for 2 days. *Id.* (Pl. Depo. I at 97:22-25, 97:2-7, 98:17-23 and Ex. 14 thereto, attached to the Stein Dec. as Ex. 14). Plaintiff returned to the doctor on May 21, 2009 to have his back examined. JSUF 33. He was provided with a Work Release stating that he was unable to return to work until May 29, 2009. *Id.* His doctor stated that Plaintiff still had “too much (sic) spasms and inflammation to return to limited duty.” *Id.* (Pl. Depo. I at 100:8-12, 101:8-13 and ex. 15 thereto, which is attached to the Stein Dec. as Ex. 15).⁴

Plaintiff provided a Work Release on May 28, 2009 stating that he unable to return to work until June 8, 2009. JSUF 34. He was told by his doctor to be on bed rest for two days and to be on medications “by clock” because of the spasms in his back. *Id.* (Pl. Depo. I at 102:1-3, 103:11-19, 104:1-3 and Ex. 16 thereto, attached to the Stein Dec. as Ex. 16; Vito Dec. ¶ 22 and Ex. 17 thereto). Plaintiff provided the work release to Defendant, but he does not recall to whom he gave it or whether he initiated any discussions with the company about it. JSUF 35 (Pl. Depo. I at 104:7-25).

On June 4, 2009, Plaintiff provided another Work Release from his doctor stating that he was unable to return to work until June 19, 2009. JSUF 36 (Pl. Depo. I at 105:25-106:3 and Ex 18 thereto, which is attached to the Stein Dec. as Ex. 18).

On June 18, 2009, Plaintiff sent an email to Defendant stating, “I have just returned from a

⁴Plaintiff states in his declaration that “During the period of May 18, 2009 to August 19, 2009, I received work releases indicating a need for accommodations of intermittent medical leaves and/or work restrictions limiting my lifting. At no time did I receive a work release (doctor’s note) which stated that I was unable to perform any work of any kind during the period of May 18, 2009 to August 19, 2009.” Pl. Dec. ¶ 25. Plaintiff’s statements are contradicted by the actual doctor’s notes and emails that were provided to Defendant during this time period, of which indicated that Plaintiff was not returned to work in any capacity except for a limited time period. Defendant’s argument regarding this evidence will be addressed further below. Plaintiff also states that at no time between May 18, 2009 and August 19, 2009, did Defendant initiate any discussions with him about accommodation so that he could perform the essential functions of his job, or any available vacant job. He further states that he asked Defendant’s managers for an accommodation, but the managers refused to discuss such a possibility with him. Pl. Dec. ¶ 30.

1 doctor appointment for my on the job injury. The doctor stated that the earliest I can return to work
2 is 7-6-09. I have to complete physical therapy and return to the doctor on 7-2-09 at that time the
3 doctor will evaluate my return to work date.” JSUF 37 (Pl. Depo. I at 109:3-18 and Ex. 21 thereto,
4 attached to the Stein Dec. as Ex. 21).

5 On July 2, 2009, Plaintiff sent an email stating: “My return to work date has been extended
6 until at least 7-20-09, for my on the job injury. The muscle tear in my back is not healing, so my
7 work release has been extended.” JSUF 38 (110:13-111:2 and Ex. 22 thereto, attached to the Stein
8 Dec. as Ex. 22). Plaintiff was doing physical therapy for his back, but the physical therapy made his
9 back worse. JSUF 39 (Pl. Depo. I at 111:3-9).

10 On July 17, 2009, Plaintiff sent an email to Defendant, which stated: “My return to work has
11 been extended by my doctor to 8-10-2009, due to my on the job back injury.” JSUF 40 (*id.* at
12 111:13-21, 113:7-15 and Ex. 23 thereto, attached to the Stein Dec. as ex. 23). Dr. Rovner, who was
13 not Plaintiff’s treating physician, did not tell Plaintiff how much time he believed that Plaintiff
14 would be out of work. JSUF 41. Plaintiff does not recall if Dr. Kemprud told him how long he
15 would be out of work. *Id.* (Pl. Depo. at 111:13-21, 113:7-15).

16 On August 6, 2009, Plaintiff sent an email stating, “I had an appointment today with Dr.
17 Kemprud and my return to work date has been extended to Sep. 9, 2009. I have been referred to an
18 Orthopedic Surgeon in San Ramon, Ca for treatment to my work related back injury.” JSUF 42 (Pl.
19 Depo. I at 117:16-21, 118:15-17 and Ex. 24 thereto, attached to the Stein Dec, as Ex. 24).

20 During the time that Plaintiff was on leave, Vito had to find ways to fill the Operations
21 Director position. JSUF 43. When Plaintiff first went on leave, Vito performed both his job duties
22 and Plaintiff’s. *Id.* (Vito Dec. ¶ 10). When it became apparent that Plaintiff would be on an
23 extended leave, Vito determined that he could not continue to do both jobs and be able to do either
24 well. JSUF 44. As a result, the Operations Director from another Simon mall in the area, Dustin
25 Cox, was asked to help oversee the Operations Department at Stoneridge on an as-available basis.
26 *Id.* (Vito Dec. at ¶ 11, Franket Dec. ¶ 9). Cox would typically work several full days at Stoneridge
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1 per week. JSUF 45. However, there were times in which his duties at his other mall prevented him
2 from working more than a few hours on a given day. *Id.* (Vito Dec. ¶12).

3 On days where Cox was not able to help Vito, Vito would have difficulty completing his job
4 duties and the Operations Director's duties. JSUF 47 (Vito Dec. ¶ 13). The times where Cox could
5 not work full days at Stoneridge "also caused issues." *Id.* On those days, Vito would have to spend
6 time determining the status of the projects that Cox was overseeing that were not complete. *Id.* Vito
7 believed this was not an efficient use of his time because it essentially meant that he had to repeat
8 work that Cox had already done instead of performing his own job duties. On occasions, he gave
9 directions that were contrary to those that Cox had given, causing confusion among the maintenance
10 staff. *Id.* During the time that Plaintiff was on his first leave, Vito performed both the Mall
11 Manager and Operations Director positions. JSUF 48 (Vito Dec. ¶ 10). As such, there were
12 maintenance issues that were not being addressed as soon as needed. *Id.*

13 On August 19, 2009, Franket sent a letter to Plaintiff informing him of the decision to
14 terminate his employment. JSUF 49 (Pl. Depo. II at 259:17-260:8 and Ex. 29 thereto, attached as
15 Ex. 29 to the Stein Dec). The letter stated, "All leave available to you, including leave under the
16 Family Medical Leave Act and California Family Rights Act has been exhausted. Due to continuing
17 business needs at the mall, we find it necessary to fill your position and to terminate your
18 employment. *Id.*

19 In August 2008, Plaintiff states that he hired two Asian men to do work in the maintenance
20 department. Pl. Dec. ¶ 14. In November 2008, Plaintiff's supervisor Vito asked Plaintiff why he
21 hired the two Asians to work at the mall. Plaintiff states that he told Vito that he had hired the most
22 qualified people, and that in response, "Vito shook his head in disgust and walked away." *Id.*

23 In or about 2008 and 2009, Paragon Services was under contract with defendant to provide
24 janitorial services at the Stoneridge Mall. Paragon's site supervisor was a Hispanic female, Rocio
25 Castro. JSUF 52 (Plaintiff Dec. ¶ 15). Plaintiff alleges that in December of 2008, his supervisor
26 Vito told him that he did not want Castro working as site supervisor because she did not speak
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English well enough.⁵ Pl.’s Dec. ¶ 15. Plaintiff states that he refused to initiate the firing of Castro because he felt that Vito’s request to fire her was discriminatory. *Id.* When Plaintiff refused Vito’s request to fire Castro, Plaintiff claims that Vito told Plaintiff that he was “not a team player.” *Id.* The Vice President of Paragon Services, Steve Coto, states that soon after Vito became the Mall Manager at Stoneridge in October 2008, he began complaining about the fact that Castro spoke English with an accent. Declaration of Steve Coto (“Coto Dec.”) ¶ 4. Coto declares that Vito told him to “get rid” of Castro. *Id.* ¶ 5. Initially, Coto argued with Vito, stating that Castro was an excellent employee; however, Vito continued pressuring Coto to fire Castro from her position. *Id.* For the next nine months, Coto states that he was pressured by Vito to remove Castro from her job. *Id.* Finally “in an effort to save Ms. Castro’s job, [Coto] removed her from her supervisor position and transferred her from her day shift (about 6:00 a.m. to 2:30 p.m.) to the graveyard shift (10:00 p.m. to 6:30 a.m.).” *Id.* According to Plaintiff, after he refused to fire Castro, Vito became very curt and hostile, saying things like “I guess you are not my guy.” Pl. Dec. ¶¶ 15-19. Plaintiff recalls that Vito began criticizing him and his performance without justification. Prior to these events, Plaintiff’s job performance had been satisfactory. *Id.* Nevertheless, on January 30, 2009, Vito gave Plaintiff a progressive performance counseling memorandum, pointing out alleged deficiencies in plaintiff’s performance as Operations Director.⁶ JSUF 53 (Ex. 32 to the Stein Dec.). Plaintiff submitted a written response, refuting Vito’s allegations of performance deficiencies. Pl. Dec. ¶ 18.

B. Procedural History

On May 4, 2010, Plaintiff filed a complaint in state court alleging the following claims: 1) employment discrimination based on physical disability/medical condition, in violation of the Fair Employment and Housing Act (“FEHA”), Cal. Gov. Code § 12940 *et. seq.*; 2) failure to engage in

⁵Defendant objects to this portion of Plaintiff’s declaration on the ground that it contradicts his deposition testimony. This objection is **OVERRULED**. The deposition testimony provided by Defendant on this point is vague and it is clear that Plaintiff is unsure of the dates, whether these events occurred in December 2008 or January 2009. *See* Jackson Depo. Tr. 212:

⁶Plaintiff points out that in this memo, there is no mention of any requirement that Plaintiff life over 50 pounds as part of his performance expectations. Pl. Dec. ¶ 17.

1 the interactive process in violation of FEHA, Cal. Gov. Code § 12940 (n) *et seq.*; 3) failure to
2 provide reasonable accommodation, Cal. Gov. Code § 12940 (m) *et seq.*, 4) discrimination in
3 violation of the Family Medical Leave Act (“FMLA”) 29 U.S.C. § 2601 *et. seq.*; 5) interference in
4 violation of the FMLA 29 C.F.R. § 825.220(a)(1); 6) retaliation in violation of the FMLA, 29 U.S.C.
5 § 2615(a)(1)(2) and California Government Code § 12940 (h); 7) failure to prevent retaliation and
6 discrimination under the FMLA and Cal. Gov’t. Code; 8) termination in violation of public policy.
7 Plaintiff sought compensatory and punitive damages, attorneys’ fees and interest. Defendant
8 removed the action to this court on June 8, 2010.

9 On March 25, 2011, Defendant filed its Summary Judgment Motion. Plaintiff opposes the
10 Motion. Both parties have filed numerous evidentiary objections.

11 C. The Motion

12 Defendant asserts in its Summary Judgment Motion that all of the claims alleged in
13 Plaintiff’s original complaint fail as a matter of law. Defendant argues that Plaintiff’s first cause of
14 action for disability discrimination under the California Fair Employment and Housing Act fails as a
15 matter of law because Plaintiff cannot establish a prima facie case of disability discrimination, and
16 Plaintiff cannot establish that the legitimate, non-discriminatory reason for his termination was a
17 pretext for discrimination. Defendant argues that Plaintiff’s second cause of action for failure to
18 engage in the interactive process fails as a matter of law because Plaintiff was not a qualified
19 individual, and Defendant did engage in the interactive process. The third cause of action for failure
20 to accommodate fails as a matter of law because Plaintiff was not a qualified individual, and
21 Defendant did provide Plaintiff with a reasonable accommodation for his disability. Defendant
22 argues that Plaintiff’s fourth cause of action for discrimination under the Family Medical
23 Leave Act fails as matter of law because the Ninth Circuit does not recognize such a cause of
24 action, and even if it did, Plaintiff cannot establish her prima facie case or that Defendant’s
25 legitimate, non-discriminatory reason for terminating his employment was a pretext for
26 discrimination. With regard to the fifth cause of action, for interference with his rights under the

1 Family Medical Leave Act, Defendant argues that this claim similarly fails as a matter of law
2 because Plaintiff is not a qualified individual and he was given all of the time off work required
3 under the Act.

4 Plaintiff's sixth cause of action for retaliation under the Fair Employment and
5 Housing Act fails as a matter of law because Plaintiff cannot establish his prima facie case that
6 his employment was terminated because of he engaged in protected conduct, and Plaintiff cannot
7 establish that the legitimate reason given for his termination was pretext for retaliation. Plaintiff's
8 sixth cause of action for retaliation under the Family Medical Leave Act fails as a matter of law
9 because Plaintiff cannot establish her prima facie case that his employment was terminated because
10 he engaged in protected conduct, and Plaintiff cannot establish that the legitimate reason given for
11 his termination was pretext for retaliation.

12 Defendant argues that Plaintiff's sixth and seventh causes of action for retaliation and failure
13 to prevent retaliation and discrimination fail as a matter of law because he cannot establish a prima
14 facie case that he received a write up because he engaged in protected conduct or that his write-up
15 was a pretext for retaliation nor can he establish that he was retaliated or discriminated against.
16 Defendant further argues that Plaintiff's eighth cause of action for wrongful termination in violation
17 of public policy fails as a matter of law because Plaintiff cannot establish his prima facie case and
18 cannot prove that Defendant's legitimate, non-discriminatory reason for terminating his employment
19 was a pretext for retaliation or discrimination.

20 In his Opposition, Plaintiff argues that he has come forward with sufficient evidence that he
21 was a qualified individual and was capable of performing work and should have been
22 accommodated by Defendant. Plaintiff argues that his failure to engage in the interactive process
23 and interference claims are supported by evidence and that summary judgment is inappropriate in
24 this case. Plaintiff argues that Defendant's stated reason for his termination was a pretext for
25 disability discrimination and as a result of Plaintiff having participated in protected conduct.
26 Plaintiff argues that Defendant failed to accommodate his disability by failing to engage in the
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1 interactive process, or by offering him an alternative part-time work schedule and/or offering him a
2 different position within the company. Finally, Plaintiff argues that the evidence supports his claim
3 that he was terminated in violation of public policy.

4 **III. ANALYSIS⁷**

5 **A. Summary Judgment – Legal Standard**

6 Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories,
7 and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to
8 any material fact and that the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P.
9 56(c). In order to prevail, a party moving for summary judgment must show the absence of a
10 genuine issue of material fact with respect to an essential element of the non-moving party’s claim,
11 or to a defense on which the non-moving party will bear the burden of persuasion at trial. *Celotex*
12 *Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Further, “*Celotex*
13 requires that for issues on which the movant would bear the burden of proof at trial, that party must
14 show affirmatively the absence of a genuine issue of material fact,” that is, “that, on all the essential
15 elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for
16 the non-moving party.” *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 (11th Cir.1993). Once the
17 movant has made this showing, the burden then shifts to the party opposing summary judgment to
18 designate “specific facts showing there is a genuine issue for trial.” *Id.* at 323. On summary
19 judgment, the court draws all reasonable factual inferences in favor of the non-movant. *Anderson v.*
20 *Liberty Lobby Inc.*, 411 U.S. 242, 255(1986).

21 **B. State Discrimination Claims Based on Disability/Medical Condition (FEHA) as a** 22 **Result of Plaintiff’s Termination**

23 Defendant asserts that Plaintiff’s claims under FEHA fail because Plaintiff cannot make out a
24 prima facie case of discrimination under the California Fair Employment and Housing Act because

25 ⁷As a threshold matter, the Court notes that Plaintiff and Defendant object to portions of the
26 evidence and declarations submitted by the other party. To the extent that the Court has relied on
27 evidence to which Defendants object, that evidence is noted in this opinion, and the objections are
28 overruled.

1 he has not satisfied his burden of demonstrating that he was a “qualified individual.” Motion at 10.
 2 Defendant argues further that even if Plaintiff had made out a prima facie case of discrimination, he
 3 has not presented substantial and probative evidence of pretext in the face of the legitimate, non-
 4 discriminatory reasons offered by Defendant for Plaintiff’s termination. The Court agrees. Based
 5 on the evidence offered by Plaintiff, no reasonable jury could conclude that he was terminated based
 6 upon his disability. The claims will be addressed below.

7 1. Discrimination Under FEHA – Legal Standard

8 It is unlawful, under FEHA, for an employer “because of . . . national origin . . . physical
 9 disability . . . medical condition . . . age, . . . to discharge the person from employment . . . or to
 10 discriminate against the person in compensation or in terms, conditions, or privileges of
 11 employment.” Cal. Gov. Code § 12940(a). California courts consider FEHA claims to be analogous
 12 to discrimination claims brought under Title VII and apply the burden-shifting framework developed
 13 by federal courts to address such claims. *See Guz v. Bechtel Nat. Inc.*, 24 Cal.4th 317, 354 (2000).

14 Under that framework, the plaintiff must first establish a prima facie case of discrimination.
 15 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). For the purposes of summary
 16 judgment, a prima facie case requires the plaintiff to “produc[e] enough evidence to permit the trier
 17 of fact to infer the fact at issue.” *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 n. 7
 18 (1981). The burden of proving a prima facie case is “not onerous.” *Id.* at 253. Once a plaintiff has
 19 established a prima facie case, the burden shifts to the employer to produce some evidence that it
 20 had legitimate, nondiscriminatory reasons for the employment decision. *Watson v. Fort Worth Bank*
 21 *& Trust*, 487 U.S. 977, 985 (1988). Once an employer has produced such evidence, the plaintiff can
 22 survive summary judgment only by providing “significant, substantial evidence of pretext.” *Steckl*
 23 *v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983).

24 To make a prima facie case of discrimination based on national disability discrimination,
 25 Plaintiff must show that (1) he suffers from a disability, (2) he is a qualified individual capable of
 26 performing the essential functions of the job with or without a reasonable accommodation, and (3)

1 he was subject to an adverse employment action because of the disability. *Brundage v. Hahn*, 57
2 Cal.App.4th 228, 236 (1997); *see also Harris v. United Parcel Service, Inc.*, 2009 WL 1916930
3 (N.D. Cal., July 1, 2009) citing *Jensen v. Wells Fargo Bank*, 85 Cal.App.4th 245, 254-55, 102
4 Cal.Rptr.2d 55 (2000).

5 2. Application of the Law to the Facts of the Case – Prima Facie Case

6 The Court finds that Plaintiff has not satisfied the elements listed above for a prima facie
7 case of discrimination based upon disability. In particular, although he has presented evidence that
8 he suffered from a disability, he has failed to demonstrate that he was a “qualified individual.”

9 Plaintiff argues that he could have worked a part-time schedule, or performed tasks that do
10 not involve heavy lifting and that as a result, he was not totally disabled and should have been
11 accommodated. He argues that with accommodation such as “light work duty” or a transfer to a
12 different position, he could have performed the essential functions of his job (or a different job).
13 The Court must determine whether Plaintiff is a “qualified individual” within the meaning of the
14 law. If not, the inquiry as to the prima facie showing ends.

15 Here, the undisputed evidence shows that Plaintiff was totally disabled and that Defendant
16 was not provided evidence indicating that Plaintiff could perform any tasks, let alone heavy lifting
17 tasks. While Plaintiff now argues in opposition to the Motion that he could have worked part-time,
18 or worked a different schedule, or a different job such as a desk job, his arguments are contradicted
19 by the medical evidence submitted to Defendant during the relevant time period. Specifically, other
20 than the Work Release dated February 18, 2000, which returned Plaintiff to work with limitations,
21 (*i.e.*, he was permitted to work for seven days with a lifting restriction of no more than 5 pounds,
22 with 10 minute rest breaks every two hours and no more than 4-6 hours of work per day), Plaintiff
23 was not cleared to work at all between the date of his injury and April 23, 2009, when he again
24 submitted a Work Release that contained restrictions of lifting not more than 35 pounds for two
25 weeks. Pl.’s Decl. ¶ 20, Stein Decl., Ex. 4. On May 7, 2009, he received a work release clearing
26 him to work without limitations. Stein Decl., Ex. 11. Even so, less than two weeks later, he was
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1 again unable to work at all. On May 18, 2009, he experienced a flare-up of his back pain and
2 remained unable to work through August 2009 when he was terminated. His doctor reported that he
3 could not return to work at all from May 19 through September 9, 2009. *See* Stein Decl., Ex. 14
4 (“unable to return to work until 5-22-09”); Ex. 15 (“Unable to return to work until 5-29-09”); Ex. 16
5 (“unable to return to work until 6-8-09”); Ex. 18 (“unable to return to work until 6-19-09”); Ex. 21
6 (“The doctor stated that the earliest I can return to work is 7-6-09”); Ex. 22 (“My return to work date
7 has been extended until at least 7-20-09, for my on the job injury. The muscle tear in my back is not
8 healing, so my work release has been extended.”) Ex. 23 (“My return to work has been extended by
9 my doctor to 8-10-2009, due to my on the job back injury.”); Ex. 24 (“I had an appointment today
10 with Dr. Kemprud and my return to work date has been extended to *Sept. 9, 2009*”) (emphasis
11 added).

12 The Ninth Circuit’s decision in *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir., 1996) is
13 instructive. There, the plaintiff went on a three month medical leave for Chronic Fatigue Syndrome.
14 *Id.* at 1479. She returned to work after her first leave worked for about a month before taking
15 second medical leave. *Id.* She submitted a doctor’s note to her employer stating that she had to take
16 another medical leave, and her employer terminated her employment. *Id.* The plaintiff brought an
17 action for, among other things, disability discrimination. *Id.* The plaintiff testified at her deposition
18 that she was not totally disabled and could have performed the essential functions of her job with a
19 reasonable accommodation. *Id.* The defendant moved for summary judgment on the ground that the
20 plaintiff was not a qualified individual because she had represented in applications for state
21 disability payments that she was unable to perform her job and because her doctor had provided
22 medical certifications stating that she was not able to work. The District Court granted the motion
23 for summary judgment and the Ninth Circuit affirmed.

24 The Ninth Circuit found that the plaintiff was not a qualified individual and could not
25 establish her prima facie case of disability discrimination. When the plaintiff went on her second
26 medical leave, her physician determined that the plaintiff was totally disabled from working
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1 either full-time or part-time. The court held that this established that the plaintiff was not a
2 qualified individual and could not establish a prima facie case of disability discrimination. *Id.* at
3 1481-1482. The Court was unpersuaded by the plaintiff's deposition testimony that she was not
4 totally disabled and could have worked on a modified work schedule. *Id.* The court found that her
5 testimony "flatly contradict[ed] . . . the medical evidence." *Id.* As a result, her deposition testimony
6 could not establish that she was a qualified individual. *Id.* The Court was also persuaded by the
7 sworn statements plaintiff had provided to the Social Security Administration, claiming that she was
8 disabled. *Id.*

9 The present case is similar. At the time that Defendant terminated Plaintiff's employment,
10 the medical documents indicated that Plaintiff was not able to work at all. The Work Release forms
11 from his doctors repeatedly extended his leave, indicating that he was either incapable of working,
12 on bed rest, or at times, taking medication "around the clock." In addition to the numerous doctor's
13 notes submitted to Defendant indicating total disability, Plaintiff sent emails stating that his back
14 was not healing, that the pain was not getting better, and confirming that he could not work at all,
15 *i.e.*, stating that his return to work date would have to be "extended." Thus, the undisputed evidence
16 indicates that Plaintiff could not perform any of his job functions, let alone the disputed "essential"
17 ones.

18 Plaintiff argues that he could have done his job on a part-time basis working 4 to 6 hours per
19 day. As the Ninth Circuit concluded in *Kennedy*, Plaintiff's characterization of his condition is
20 contradicted by his own doctor's medical opinion and his own statements to his employer, informing
21 his managers that his leave would have to be extended and that there was no timetable for his future
22 return to work. *Kennedy*, 90 F.3d at 1481. As explained persuasively by one district court judge:
23 "Even if a doctor were to testify later in deposition or at trial that plaintiff was physically able to
24 have performed work with modifications, it would not alter the facts as they were plainly presented
25 to [defendant] at the time. To rule in favor of plaintiff on this point would be to hold that the
26 employer should have returned plaintiff to work when the professional medical judgment was that he
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1 was physically incapacitated.” *Swonke v. Sprint Inc.*, 327 F.Supp.2d 1128, 1133 (N.D. Cal. 2004)
2 (Henderson, J.) (Citations omitted). There, as in the present case, for many months, prior to each
3 anticipated return date, the plaintiff submitted doctor’s notes excusing plaintiff for longer periods of
4 time. *Id.* Accordingly, the district court granted summary judgment in favor of the employer,
5 concluding that plaintiff had not established that he was a “qualified individual.” *Id.* at 1135-36.

6 The Plaintiff’s prima facie case fails for an additional reason. Even if Plaintiff were
7 physically capable of working part-time, the Court nevertheless finds that he would not be a
8 “qualified individual” due to the fact that the undisputed facts demonstrate that an essential function
9 of the Operations Director’s job is being able to work at the mall full-time. Defendant has submitted
10 evidence that the Operations Director has to oversee the entire maintenance and operations of the
11 mall and supervise the maintenance workers and that a full-time Operations Director is needed to
12 oversee the department. JSUF 8, 11, 12; Declaration of Rob Courtney, ¶ 5. Defendant’s evidence is
13 supported by Plaintiff’s own testimony, in which he stated that his job required him to work between
14 50 and 70 hours per week. Pl.’s Dec. ¶ 11. Full-time attendance at work can be an essential job
15 function. *See e.g., Mulloy v. Acushnet, Co.*, 460 F.3d 141, 148-153 (1st Cir. 2006). Plaintiff has
16 admitted that he could not perform this essential function of his job. Although Plaintiff argues that
17 he could have performed his job on a part-time basis (4-6 hours per day), this argument is not
18 evidence, and further, it is contradicted by his own deposition testimony in which he testified that his
19 job required him to work 50-70 hours per week. *See e.g., McEnroe v. Microsoft Corp.*, 2010 WL
20 4806864 *2 (E.D.Wash., Nov. 8, 2010) (“Plaintiff’s subjective belief as to what a job’s essential
21 functions are comprised of is not evidence”). As a matter of law, Plaintiff cannot be a qualified
22 individual if his own doctors had not released him to attend his job. *See e.g., Hatchett v. Philander*
23 *Smith College*, 251 F.3d 670, 675 (8th Cir. 2001) (a plaintiff is not a qualified individual if he cannot
24 perform the essential functions of an eight-hour job on a part-time basis).

25 Plaintiff’s argument that he could have worked another position is similarly unsupported by
26 the evidence. Opp. at 16. Plaintiff argues that he could have worked a desk job, or taken a
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1 marketing position within the company. Putting aside for the moment that the undisputed evidence
2 submitted by Defendant indicates that the jobs Plaintiff mentions in his declaration would result in
3 promotions, the medical evidence presented to Defendant at the time is contrary to Plaintiff's current
4 assertions. The medical evidence submitted on repeated occasions to the human resources
5 department stated that Plaintiff was unable to work. The Plaintiff's physician checked the box
6 "unable to work" not "unable to work with the following limitations." Thus, given the fact that
7 Plaintiff was unable to work, there was no other available job to which Plaintiff could have been
8 assigned.

9 Even if Plaintiff had been able to perform some work, the only other option Plaintiff would
10 have had in the Operations Department was to become a maintenance worker. *See Vito Dec. Para.*
11 *16.* The evidence is undisputed that a maintenance worker position would have required more
12 physical tasks than Plaintiff's original position. Defendant has submitted evidence that demonstrates
13 that there were no other management positions available in the mall. Plaintiff does not dispute this
14 evidence. The Court finds that Defendant was not obligated to create a new job for Plaintiff or
15 reassign him if it had no vacant position for him. *See Cal.Gov't.Code section 12926(n), Spitzer v.*
16 *Good Guys, Inc.*, 80 Cal.App.4th 1376, 1389 (2000) (Under FEHA, an employer is relieved of the
17 duty to reassign a disabled employee whose limitations cannot be accommodated in his job if there
18 is no vacant position for which the employee is qualified).

19 Thus, the Court finds that Plaintiff has not made out a prima facie case of disability
20 discrimination. This failure is fatal to Plaintiff's claims for disability discrimination, retaliation, and
21 failure to engage in the interactive process.⁸

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25 ⁸The interactive process claim fails because there was nothing for defendant to do until it
26 received notice that Plaintiff would be released to work with or without limitations. As one court
27 explained: "The Court cannot impose upon the employer an obligation to engage in a process that was
28 guaranteed to be futile." *Swonke*, 327 F. Supp.2d at 1137.

3. Plaintiff Fails to Rebut Defendant's Proffered Nondiscriminatory Reason

Assuming for the sake of argument that Plaintiff were able to make out a prima facie case of disability discrimination, the Court finds that Plaintiff has failed to rebut Defendant's proffered nondiscriminatory reason for the termination – Defendant needed a Director of Operations to be able to be at work full-time and perform the essential functions of the job. According to the medical evidence and emails before it, Defendant determined that Plaintiff was not able to work at all, let alone perform the essential function of his job. Further, it had been six months and Plaintiff had not provided his employer with any timetable for his return to work; rather, he sent repeated emails informing his employer that his return to work date would be “extended.” Thus, Defendant decided to terminate Plaintiff's employment and hire a new Director of Operations.

Because Defendant has presented evidence of a legitimate non-discriminatory reason for termination, the burden shifts to back to the Plaintiff to present substantial evidence of pretext. The Court concludes that he has not done so.

To establish that Defendant's reason for terminating Plaintiff was a pretext for disability discrimination, Plaintiff must “demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of credence, and hence the employer did not act for [the asserted] non-discriminatory reasons.” *Hersant v. Dep't. of Social Services*, 57 Cal.App.4th 997, 1005 (1997). To prove pretext, Plaintiff must proffer “specific, substantial evidence.” *Id.*; *Crosier v. United Parcel Service, Inc.*, 150 Cal.App.3d 1132. Assertions and conjecture that an employee had a discriminatory motive will not establish pretext. *Martin v. Lockheed Missiles & Space Co., Inc.*, 29 Cal.App.4th 1718, 1735 (1994). If, considering the employer's non-discriminatory explanation for its actions, “the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory,” summary judgment should be granted in favor of the employer. *Guz v. Bechtel National, Inc.*, 24 Cal.4th 317, 361 (2000).

Here, Plaintiff has not presented evidence from which a jury could conclude that the explanation offered by Defendant – that Plaintiff was fired based Defendant’s need to fill the position with a full-time employee who is capable of performing the essential functions of the position – is unworthy of credence. Plaintiff’s evidence of discriminatory intent consists of the allegation that seven months previously, his supervisor, Vito, asked him to fire a Hispanic sanitation worker and then when Plaintiff refused, Vito became curt and hostile and two months later submitted a performance review criticizing Plaintiff’s job performance. Plaintiff has also presented evidence that prior to this incident, Vito asked him why he hired two Asian workers and when Plaintiff explained that they were the most qualified applicants, Vito shook his head in disgust and walked away.” Pl. Decl. ¶ 14.⁹ These actions, however, occurred some seven to eight months prior to Plaintiff’s termination.¹⁰ This time delay is fatal to Plaintiff’s claim that his termination was somehow connected to these acts.

A significant delay between the allegedly discriminatory act and the adverse employment action (when a plaintiff relies upon mere temporal proximity) can be fatal to a plaintiff’s discrimination claim. *See e.g., Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (three month period between the activity and termination standing alone insufficient to establish causal nexus); *Hughes v. Derwinski*, 967 F.2d 1168, 1174-75 (7th Cir. 1992) (“The temporal proximity of

⁹There is some dispute about this testimony. At Plaintiff’s deposition, he did not say that Vito “shook his head in disgust” as he now states in his declaration. Defendant’s Objection to the Declaration of Steven Jackson at 7. Rather, at his deposition, he said that Vito gave him a “funny look” and walked away.

¹⁰Plaintiff also argues, without evidentiary support, that “[i]n February of 2009, Vito (defendant) refused to grant plaintiff an accommodation for his disability” as further evidence of a pattern of antagonistic conduct. Opp. at 22. The undisputed evidence, however, demonstrates that Plaintiff was granted twice the amount of leave required under federal law, and that Plaintiff was not cleared to work by his own medical doctors in order to work the part-time schedule or “light duty” that he now claims he should have been provided. Plaintiff’s reference to maintenance worker Roberto Firmeza’s light duty/modified work schedule is a red herring. *See* Opp. at 22. The evidence in this case demonstrates that Mr. Firmeza was not a salaried managerial employee and that full-time employment was not an essential function of his job. Franket Suppl Decl. ¶5. Additionally, his medical doctors had cleared him to perform the essential functions of his job (*e.g.*, lifting “up to and more than 50 pounds”) with certain limitations as to the use of his right hand. Fermeza Decl. ¶3. Thus, Plaintiff’s claim of differential treatment on account of Firmeza’s schedule is unfounded.

[plaintiff's] filing and the issuance of either letter, standing by itself, does not sufficiently raise the inference that [the plaintiff's] filing was the reason for the adverse action. Hughes is required to produce such evidence if he is to defeat the [defendant's] summary judgment motion on this issue.")

While Plaintiff is correct that a "pattern of antagonism" may create an inference of a causal nexus of retaliation, Plaintiff has made no such showing here. Opp. at 22 (citing *Porter v. Cal. Dep't. of Corr.*, 419 F.3d 885, 812 (9th Cir. 2005)). As Defendant correctly points out, in order for an alleged "pattern of antagonism" to establish that there was continuing retaliation against plaintiff for engaging in protected conduct, Plaintiff must show that the acts were in some way damaging to his employment. Def.'s Reply at 14 (citing *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.4th 1028, 1055-6 (2006)). There is no evidence of any ongoing pattern of antagonism or discrimination such that a rational trier of fact could conclude that Plaintiff's termination and Vito's discriminatory conduct seven months earlier are causally related. The Court finds that Plaintiff has not made the requisite causal showing to make out a claim for discrimination or retaliation. Accordingly, the Court finds that this evidence of pretext is not sufficient to defeat Defendant's summary judgment motion.

4. Plaintiff's FMLA Claims¹¹

In order to establish a claim for interference under the FMLA, the Plaintiff must show that his employer discouraged him from taking leave under the FMLA or avoided the employer's use of leave. 29 C.F.R. §§ 825.220 (b).

Plaintiff argues first that he was able to work during the time period from May to August 2009, and that defendant has failed to provide evidence that he was unable to return to work. Plaintiff further argues that his employer never told him that the more than 12 weeks of leave he received was designated "FMLA leave" and that as such, he states a claim for interference. Opp. at

¹¹Defendant moved for summary judgment first on the ground that the FMLA does not provide a cause of action for discrimination. Rather, claims for retaliation discrimination for taking FMLA leave are to be construed as interference claims. See *Bachelder v. America West Airlines*, 259 F.3d 1112, 1124 (9th Cir. 2001) (*McDonnell-Douglas* burden shifting analysis inapplicable to "retaliation" claims under FMLA; such claims are not "retaliation claims" but rather, interference with FMLA rights). Plaintiff does not oppose this portion of the motion, and summary judgment on Plaintiff's FMLA discrimination claim (Claim 4) is GRANTED.

20 citing 29 C.F.R. § 825.300(b) and (c)(5). Finally, Plaintiff objects to the declarations of Courtney, Vito, Albright and Franket to the extent that these witnesses state the essential functions of Plaintiff's job because these declarations "lack foundation" or somehow do not know the essential functions of the Operations Manager position.

The Court is not persuaded by these arguments. First, for the reasons stated previously, the Court has concluded that Plaintiff's own evidence – emails and doctor's notes – are sufficient to establish that Plaintiff was not able to engage in the essential functions of his job. Moreover, whether or not his employer designated the leave as "FMLA leave," Plaintiff does not dispute that he was given more than 12 weeks of leave (the time permitted under the FMLA) during the relevant time period.¹² The record in this case permits no inference that Defendant denied or interfered with Plaintiff's exercise of his rights to leave. It is undisputed that Plaintiff was entitled to a maximum of 12 workweeks of leave under § 2612(a)(1)(D); and that he received those 12 weeks of leave. The fact that Plaintiff was not restored to his position at the end of the more than 12-week period did not infringe his FMLA rights because it is also undisputed that at the end of that period he remained unable to perform the essential functions of his Operations Manager position. Thus, under 29 C.F.R. §§ 825.216(d) and § 825.214(b), the FMLA did not entitle Plaintiff to be restored to his former position or to any other position.

Accepting as true for purposes of summary judgment that Defendant failed to inform Plaintiff that the leave it was providing him was designated "FMLA leave" the Court is persuaded by an opinion from the Second Circuit *Sarno v. Douglas Elliman*, 183 F.3d 155, 161-162 (2d Cir. 1999). There, on similar fact, the court concluded that no rational finder of fact could conclude that Plaintiff's exercise or attempted exercise of his FMLA rights was in any way affected by

¹²Indeed, Plaintiff received more than twice the amount of leave required under the FMLA. It is undisputed that Plaintiff was on leave for approximately 12 weeks from February 9, 2009 until he returned to work on May 7, 2009. He re-injured his back and went back on medical leave on May 19, 2009. He remained on leave continuously, as he submitted doctors' notes extending his leave through September 9, 2009, which resulted in three months of additional leave until the date of his termination on August 19, 2009 (in addition to the 12 weeks from February-May 2009).

1 Defendant's failure to inform him that the Act entitled him to a leave of up to 12 work weeks. The
2 Court explained

3 Assuming *arguendo* that [Plaintiff] should have been given more explicit notice than was
4 given (we note that the Act itself provides only for the posting of summary notices, *see* 29
5 U.S.C. § 2619(a), and that the additional notice provisions set out in the regulations are
6 highly ambiguous, *see* 29 C.F.R. §§ 825.301(a)(1), (a)(2), (b)(1)(i)-(viii), and (b)(2)),
7 [Plaintiff's] right to reinstatement could not have been impeded or affected by the lack of
8 notice because his leave was caused by 'a serious health condition that [made him] unable to
perform the functions of [his] position,' 29 U.S.C. § 2612(a)(1)(D), and it is undisputed that
that inability continued for some two months after the end of his 12-week FMLA leave
period. Any lack of notice of the statutory 12-week limitation on FMLA leave could not
rationally be found to have impeded [Plaintiff's] return to work.
Id., 161-162.

9 Further, the court rejected the Plaintiff's effort to have his FMLA claim be based solely upon
10 "failure to give notice." The court explained:

11 Finally, to the extent that [plaintiff] contends that the assumed right to notice stands as an
12 independent right under the Act, and that an employee may sue the employer for failure to
13 give notice even if that failure in no way affected the employee's leave, benefits, or
14 reinstatement, we reject that contention. The Act makes it unlawful for the employer to
15 impede an employee's actual or attempted "exercise" of a right provided under subchapter I.
A right to receive notice is not a right that the intended recipient of the notice "exercise[s]."
We decline to interpret the FMLA as giving an employee a right to sue the employer for
failing to give notice of the terms of the Act where the lack of notice had no effect on the
employee's exercise of or attempt to exercise any substantive right conferred by the Act.
16 *Id.* at 162.

17 Here, Plaintiff argues weakly that "an employer's failure to notify a plaintiff of his FMLA
18 rights may constitute 'interference' with FMLA rights." *Opp.* at 20. The Court is persuaded by the
19 court's analysis in *Sarno* and concludes that no claim for interference under the FMLA claim can be
20 stated as a matter of law.

21 Finally, with respect to Plaintiff's objections to Defendant's declarations on the issue of what
22 constitutes the "essential functions" of Plaintiff's position, these evidentiary objections are
23 overruled. Defendant's witnesses have ample knowledge of the job description of Operations
24 Manager and can testify as to the expectations of the position. In any event, their descriptions of
25 what is essential to the position are irrelevant given that the Court has found that Plaintiff was not
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1 cleared by his own doctor to perform *any* work, let alone what may or may not be the essential
2 functions of his position.

3 **5. Wrongful Termination in Violation of Public Policy**

4 Defendant asserts that it is entitled to summary judgment on Plaintiff's claims for wrongful
5 termination in violation of public policy because these claims are based on her claims under FEHA,
6 the FMLA, which Defendant asserts fail for the reasons discussed above. These claims rise and fall
7 with her remaining claims. Because Defendant is entitled to summary judgment as to Plaintiff's
8 claims as they relate to wrongful termination based on disability, summary judgment on Plaintiff's
9 violation of public policy claim is GRANTED.

10 **IV. CONCLUSION**

11 For the reasons stated above, Defendant's Summary Judgment Motion is GRANTED.
12 The Clerk shall close the file.

13 IT IS SO ORDERED.

14 Dated: June 17, 2011

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17 JOSEPH C. SPERO
18 United States Magistrate Judge
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